RSC Republican Study Committee

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Cost to the Taxpayers

The Democrats detached the permanent "doc fix" provision from the larger bill, H.R. 3962, and introduced it separately (without it being paid for), as H.R. 3961, so that the cost of the "doc fix" would not count against the cost of the underlying government healthcare takeover bill for the purposes of PAY-GO. On November 4, 2009 CBO determined that H.R. 3961 will cost $210 billion over 10 years. CBO reduced its cost estimate from a previous $245 billion in H.R. 3200 due to the Obama administration's, acting through HHS, retroactive removal of the cost of physician-administered drugs (and other services provided incident to the physician visit) from the formula. However, even the $245 billion figure was understated as CBO had already reduced the score to take into account the pending HHS regulations. **The true cost of H.R. 3961 is $279 billion without being paid for.** In 2005 and 2006 when faced with significant cuts, Republicans found ways to pay for it. Some conservatives may be concerned that the Democrats are not being honest with the American people concerning the cost of this legislation.

Furthermore, according to the Budget Committee, if the "doc fix" was added back to the health reform bill, the result would increase the deficit by $170 billion. **Adding the SGR fix to the Pelosi government takeover of health care bill (H.R.3962) would bring the true cost up $1.5 trillion.**

For more details on these concerns, see below.

H.R. 3961 — Medicare Physician Payment Reform Act of 2009
(Dingell, D-MI)

Order of Business: The bill is scheduled to be considered the week of November 16, 2009 under a closed rule, allowing one Republican substitute. The rule for H.R. 3962, which passed 220-215 on November 7, 2009, allowed for separate consideration of H.R. 3961 ("doc fix") under a closed rule with one hour of general debate. Once the "doc fix" passes on the House floor, statutory PAY-GO (H.R. 2920) would be automatically engrossed into H.R. 3961. H.R. 3961 ("doc fix") would NOT be added onto H.R. 3962 (the underlying government healthcare takeover bill).

Medicare Physician Payment Reform "Doc Fix"

<u>Background</u>: Medicare Part B (the physician services component) payments are done through a fee schedule created by CMS in order to "accurately" reimburse for services. Congress first moved to a Sustainable Growth Rate (SGR) system under the Balanced Budget Act of 1997 due to mounting concerns over reining in the rising costs of physician reimbursements. However, this was not the first time "expenditure targets" were deployed. In 1989, Congress passed the Omnibus Budget Reconciliation Act which established Medicare Volume Performance Standards (MPVs) with three conversion factors for different categories of services. The SGR system attempted to fix the problems with MPVs by moving to one conversion factor and attaching consequences to exceeding expenditure targets that were tied to Gross Domestic Product (GDP) in order to hold reimbursement costs constant to national income.

However, every year since 2002, the SGR formula has called for cuts to reimbursement, and every year Congress has acted to override the reductions culminating in a 21.2% scheduled cut for 2010 unless Congress acts once again. It is important to note that SGR, while setting caps on payments for specific services, does not set caps on volume, thus as volume went up cuts were triggered. Numerous concerns exist with the SGR formula, including concerns with tying the target rates to GDP when many argue that the Medicare Economic Index (MEI) is a more accurate measure of medical inflation, fundamental flaws with the formula itself, or simply the government's price setting scheme more concerned with dollars and cents than quality patient care.

Unlike the House government takeover of health care bill, the Senate Finance Committee bill, the America's Healthy Future Act of 2009 (S.1796), did not even attempt to fix SGR– instead the bill used a budget gimmick so that CBO assumes Congress will let a 25% cut occur in 2011. This remains politically unrealistic. On October 21, 2009 however, the Senate filed cloture on the motion to proceed to S.1776 (Stabenow, D-MI) which would have repealed SGR and wiped out the debt that has been accumulated under the system, setting future payment updates at zero (not taking into account inflation) – <u>without</u> paying for it. The vote failed 47-53 with 12 Democrats and one Independent joining Republicans not to proceed.

<u>Summary:</u> The Pelosi government healthcare takeover bill used a budget trick to avoid offsetting the nearly $210 billion cost of enacting a permanent restructuring of the Sustainable Growth Rate (SGR), or "doc fix". H.R. 3961 in many ways resembles Section 301 of the CHAMP Act (H.R. 3162) but rather than eliminating the single conversion factor currently applied to all physician services and creating six different categories with separate "Target Growth Rates", the bill would alter the current Sustainable Growth Rate (SGR) system by establishing two new categories of service reimbursements while wiping out the 21% accumulated cuts and removing physician administered drugs from the calculation. The bill will affect physicians who participate in Medicare and TRICARE, and beneficiaries under Medicare Part B. The following are the main provisions of the bill:

- Does not eliminate or repeal the SGR system as a whole, rather it makes changes to the growth rate formula to alleviate the cuts.

- Rebases SGR using a new baseline year, 2009 (rather than 1996 under current law), thus eliminating the 21.2% cut. The bill limits the cumulative debt to five years such that the fifth year before the year involved becomes the new baseline year (e.g., in 2015 the baseline year will become 2010).
- Provides for an update in 2010 equal to the percentage increase in the Medical Economic Index (MEI), which is a measure of practice cost inflation used to estimate annual changes in physicians' operating costs and earnings levels (which is estimated at 1.2%).
- In 2011, it establishes two separate "Target Growth Rates" and conversion factor updates based on GDP - which is currently used for SGR. The two "baskets" are:
    - Evaluation, prevention and management services (primary care) with a target rate set at GDP growth plus 2%
    - All other services with a target rate set at GDP growth plus 1%
- Exempts services provided incident to the physician visit (such as physician administered drugs) from the SGR formula.
    - In order to reduce overall growth, and thus corresponding cuts, only physician services would be included in the calculation of actual and target growth expenditures. Ancillary services were removed as many doctors argue that they have no control over the cost of items such as drugs.
    - Some Republicans have been supportive of this in the past and during the Bush Administration there were efforts made by Congress for CMS to remove the drugs through the regulatory process but the Agency at that time said it had to be done legislatively.

<u>Conservative Concerns</u>: Regrettably, politicians in Washington continue to use ploys and gimmicks to gain support for measures such as H.R. 3962 that hurt rather than help the patient - doctor relationship. While a "doc fix" is important, and the proposal to wipe out the cuts, remove physician drugs, and make changes to SGR through creating two "Target Growth Rates" is a move in the right direction, **if the Majority was truly serious about maintaining access to care for seniors it would make paying for such an important provision a priority. Instead of using $505 billion in cuts to Medicare as part of a government takeover of health care (as Democrats propose in H.R. 3962), we should first make the current Medicare system sustainable.** The following are some of the potential conservative concerns:

Fiscal Recklessness:
- This legislation would add a quarter trillion dollars over ten years to federal deficits that are already forecast to hover around one trillion dollars annually.
- Democrats cannot claim that their health care reform plan is paid for and refuse to pay for over $200 billion dollars of it at the same time. **The true cost of the health care bill is now $1.5 trillion, and the impact on the deficit is an increase of $170 billion.**
- This Congress is burying future generations in massive debt and refuses to make the tough choices to pay for its expensive priorities.
- Some conservatives may be concerned that the bill, by establishing growth rates tied to GDP plus 1% or 2%, will gradually increase the overall portion of our nation's income dedicated to federal health care spending. This is ultimately unsustainable.

Budget Gimmick:

- Democrats are cooking the books to cover up the fact that this will cost us a quarter trillion dollars over the next decade.
- By attempting to ignore the cost of the fix, Democrats are asking Americans to look the other way as they continue to explode the deficit.

Hurts Seniors:

- If Democrats were serious about a physician reimbursement solution, they would use money derived from their large cuts to Medicare to pay for it, rather than dedicating that money to a federal takeover of health care that will make seniors worse off.
- Through administrative actions, seniors can expect to shoulder tens of billions of dollars in new costs through higher premiums, while at the same time receiving cuts to Medicare benefits and services provided through programs such as Medicare Advantage in H.R. 3962. CBO estimated that of the $260 billion cost, nearly $50 billion will be paid for by increasing Medicare beneficiaries' Part B premiums.

Political Gimmick:

- Democrats know this bill has no chance of becoming law and appear to be more concerned about looking like they support physicians rather than really helping them.
- **The Senate has already rejected an unpaid for "doc fix" (S. 1776). The vote failed by a resounding 47-53 (well short of the 60 votes needed) with 12 Democrats and one Independent joining Republicans not to proceed.**
- Republicans will not play along in a political charade that demeans physicians as just some special interest to be paid off on the path toward government-run health care.
- Passing SGR as a stand alone without pay-fors will open the door for the Democrats to game the final score of health care reform.
- This political gimmick is further evidence that Democrats lack an appreciation for the health care services provided to seniors.

Broken Promises:

- The bill, if not paid for, certainly adds to the deficit, putting Obama in a difficult position – if he supports the SGR fix with no pay fors, he breaks his promise that "I will not sign health insurance reform — as badly as I think it's necessary, I won't sign it if that reform adds even one dime to our deficit over the next decade — and I mean what I say." If he opposed the SGR fix with no pay fors, he risks loosing badly needed physician support and is faced with it being added back into the larger health reform bill, thus breaking another promise that health care reform won't cost more than $900 billion dollars.

Still a Problem for Doctors:

- The bill does not eliminate or repeal the SGR system as a whole, rather it makes changes to the growth rate formula to alleviate the cuts (replaces the old formula with a new formula).
- In 2011, it establishes two separate "Target Growth Rates" and conversion factor updates based on GDP - which is currently used for SGR.
- Without a fully paid for SGR repeal, some conservatives may be concerned that this bill doesn't go far enough. For many doctors and conservatives the "right" fix is doing away

with the current payment system all together or moving toward a more accurate assessment of costs.

- Some conservatives may see the new target rates as simply establishing 2 mini-SGRs in the sense that they can still be cut up to 7% as is the case under current law.

While conservatives are supportive of fixing the SGR, it has become apparent that Democrats cannot maintain fiscal restraint on their government take-over of health care legislation, and thus have been reduced to playing tricks on the American public in order to pass legislation.

Statutory "PAYGO"

The rule for H.R. 3962 (the Democrats' government takeover of health care bill) provided for automatic engrossment of statutory PAY-GO (H.R. 2920) into H.R. 3961 upon enactment of H.R. 3961 ("doc fix"). H.R. 2920 passed the House by a vote of 265 to 166 on July 22, 2009. For the RSC Legislative Bulletin on H.R. 2920, see here.

H.R. 2920 is, in general, intended to enact a statutory PAYGO requirement to some spending legislation, and to most tax legislation. Highlights of the legislation are as follows:

PAYGO Scorecard: The legislation applies a PAYGO requirement to the *53%* of the federal budget that consists of entitlement spending and to *most* changes to tax law (with some exceptions, as detailed below). Violations of PAYGO would not be judged on a per-bill basis (as under the current House PAYGO rule), but instead would be judged at the end of each year by two separate standards: the average annual impact on the deficit over five years, and the average annual impact over ten years. To the extent that this scoring system shows bills passed by Congress (again, counting only the types of budget decisions that H.R. 2920 subjects to the PAYGO requirement) led to a *net* deficit impact over either period, OMB would be required to issue a sequester order to get rid of the violation. CBO scoring would be used to measure the "cost" of legislation, except where a CBO score is unavailable (in which case OMB could supply the score). *Note*: OMB is a partisan entity, while CBO is non-partisan.

PAYGO and "Policy Adjustments": The legislation creates a new baseline to measure compliance with PAYGO that differs with the current House PAYGO rule (which uses CBO's baseline). Specifically, H.R. 2920 builds into the baseline:

- The cost of extending higher physician payment rates;
- The "cost" of maintaining the death and gift tax at 2009 levels (which is actually a substantial tax increase compared to the scheduled repeal of the death tax in 2010).
- "AMT Patch": Potential legislation that prevents the number of individuals who pay the Alternative Minimum Tax (AMT) AMT (compared to 2008) from growing.
- Legislation that extends the expiration date of the:
    1. 10% marginal tax rate;
    2. the $1,000 tax child credit;
    3. the marriage penalty tax relief;
    4. the $10,000 adoption tax credit;
    5. the child care tax credit;

6. the dependent care tax credit;
7. the education tax benefits provided in the Economic Growth and Tax Relief Reconciliation Act of 2001;
8. the lower 25% and 28% marginal tax rates; and
9. The 33% marginal tax rate (as it applies to individuals earning less than $200,000 and joint filers earning less than $250,000).

Of note, this list does *not* include many other expiring tax cuts, such as the lower 35% tax rate, and the lower 15% capital gains/dividend tax rates.

Emergency Designation: The bill allows Congress to get around all of the constraints of the legislation by simply applying an emergency designation. In practice, this means that the legislation is very unlikely to exert much pressure against legislative changes that increase the deficit. There is *no* limit on how often, or for what, this emergency designation could be used.

Sequestration: The legislation generally uses the same sequestration process as the 1990 Budget Enforcement Act. As CBO notes, the vast majority of the federal budget is exempt from sequestration under that process. The bill further increases the portion of the federal budget that is exempt from sequestration to include TARP and SCHIP, among other things.

Discretionary Spending and PAYGO: H.R. 2920 does not impose any limit on how much discretionary spending through the appropriations process can increase (not even on spending above what is assumed in the baseline).

What PAYGO Does Not Do: Under H.R. 2920, PAYGO would ***NOT***:

- apply to authorized discretionary spending;
- apply to the 40% of the federal budget that consists of discretionary spending;
- limit unsustainable entitlement spending growth that will occur under current law;
- impose any limit at all on federal budget deficits;
- place any obstacle to legislation that increases the federal debt limit—Congress has increased the debt limit 4 times since the House PAYGO rule was adopted two and a half years ago;
- impose any limit at all on how much the federal debt can grow;
- impose any limit at all on the federal government's unfunded obligations;
- allow for the extension of many expiring tax provisions, unless offsets are included;
- require any reforms that would put the federal budget on a sustainable course—CBO, GAO, and many other objective analysts have concluded that the longer-term federal budget outlook is unsustainable if the federal budget is simply left on auto-pilot (the maximum constraint PAYGO ever imposes); or
- have any effect at all if Congress decides that the legislation constitutes an "emergency."

Additional Background: At the beginning of the 110th Congress, the new Majority adopted a PAYGO rule that applies to legislative provisions *"affecting **direct spending** and **revenues** have the net effect of increasing the deficit or reducing the surplus…"* Two things are of note on the House version of the PAYGO rule. First, PAYGO is applied unevenly to revenue and spending budget choices. While PAYGO applies to 100% of federal tax collections it only applies to the 53% of federal spending that consists of direct spending. Second, the PAYGO rule judges whether a direct spending/revenue provision worsens the budget deficit in comparison to the CBO baseline. For the spending side of the ledger, this means that PAYGO imposes no limit on entitlement spending increases that occur under current law. For the revenue side of the budget, this means that extensions of current tax law (if scheduled to expire at a future date—such as with the AMT patch, the 2001 and 2003 tax cuts, and the "tax extenders") must be offset.

In the 110th Congress, under the House PAYGO rule, Congress enacted $420 billion worth of PAYGO violations (see this document by House Budget Committee Republicans on PAYGO compliance in the last Congress). The deficit has increased by ***$1.2 trillion*** in the more than two years since the Democrats adopted the PAYGO rule at the beginning of the 110th Congress.

H.R. 2920 proposes a weaker version of PAYGO compared to the current House rule in at least two respects. First, it eliminates the theoretical (and often ignored) requirement that *every* bill comply with the PAYGO requirement. Instead, H.R. 2920 creates a running tally of all bills enacted over the Congress (that count per the legislation), and requires that the overall balance come out even (on an average over five years and ten years). Second, H.R. 2920, allows some expiring tax cuts to be maintained without counting against PAYGO, as well as the cost of extending higher physician reimbursement rates.

H.R. 2920 is theoretically stronger than the current House PAYGO rule in that it would be enforced with potential sequestrations of federal spending. However, from 1990-2002 no sequestration ever actually occurred because of a PAYGO violation, and the vast majority of federal spending is exempt from potential sequestrations (H.R. 2920 increases the number of programs exempt from sequestrations).

Democrat Inconsistency Alert!

Deficit Increases and PAYGO: Democrats will claim that statutory "PAYGO" will prevent legislation from increasing the deficit. However, H.R. 3961 will increase spending by $209 billion over ten years. And enactment of H.R. 2920 would do nothing to prohibit deficit spending for this purpose, and under various other circumstances.

Potential Conservative Concerns on H.R. 2920: Many conservatives have expressed concerns on H.R. 2920. Some of these concerns are as follows:

No Effect on Discretionary Spending. The legislation, while applying to almost all federal tax collections, only applies to 53% of federal spending. Discretionary spending is completely exempt from the legislation, even increases above what is assumed in CBO's baseline.

Could Lead to Tax Increases. The bill requires tax increases to "pay for" merely extending current tax policy in some cases. This includes the lower 35% top income tax rate (scheduled to increase to 39.6% in 2011), and the lower 15% top tax rate applied to capital gains and dividend income.

Lack of Enforcement. The bill relies on the same sequestration process as the 1990 Budget Enforcement Act. That sequestration process exempts the vast majority of federal spending. Under the old PAYGO rule, CBO notes that a sequestration never actually took place.

Does Nothing to Put Budget on Sustainable Course. Under current budget outlook, the public debt will double in five years and triple in ten years. The legislation does nothing to improve this already unsustainable budget outlook—the most it can claim to intend to do is prevent the budget outlook from getting even worse.

PAYGO Does Not Work. The deficit has increased by ***$1.2 trillion*** in the more than two years since the Democrats adopted the PAYGO rule at the beginning of the 110th Congress. It has gone from **$162 billion** in FY 2007 (the last budget process without any PAYGO rule) to a projected **$1.42 trillion** in FY 2009.

Groups Opposing H.R. 3961: American Association of Physician and Surgeons, Americans for Prosperity, Americans for Tax Reform, Citizens Against Government Waste, Club for Growth, Freedomworks, and National Taxpayers Union.

Committee Action: The "doc fix" was originally attached to H.R. 3200 (Sec. 1121), which was referred to the House Committees on Energy and Commerce, Ways and Means, and Education and Labor and reported out on October 14, 2009. H.R. 3961 was introduced on October 29, 2009 and referred to the House Energy and Commerce Committee and the Ways and Means Committee.

Does the Bill Expand the Size and Scope of the Federal Government?: Yes, the bill provides $209 trillion over 10 years in new mandatory spending.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No CBO report was available at press time.

Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits?: There is no committee report citing constitutional authority available on H.R. 3961. However, the committee reports for H.R. 3200 state that the bill does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI of the Rules of the House of Representatives

Constitutional Authority: There is no committee report citing constitutional authority available on H.R. 3961. However, the Committee reports for H.R. 3200 state that pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committees found that the constitutional authority for H.R. 3200 is provided in clauses 1, 3, and 18 of Article I, section 8 of the United States Constitution.

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